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No.

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In the

Supreme Court of the United States

October Term, 1982

J. RICHARD DiROSE,

Petitioner,

vs.

PK MANAGEMENT CORP. and FRANK CICCARELLI,

Respondents.

Respondents' Brief in Opposition to Certiorari

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Questions Presented.

1. Was the Court of Appeals' reversal based upon errors in the trial court's charge, evidence which was improperly admitted, on the lack of the evidence, or on all three grounds?

2. To the extent that the Court of Appeals' reversal was based on a lack of evidence, was the court governed by an improper standard?

3. Does the Court of Appeals, Second Circuit, generally employ an improper standard different from those employed by other circuit courts in determining whether there is insufficient evidence to support a verdict which necessitates a review of the court's order?

Table of Contents.

	Page
Questions Presented	i
Table of Authority	ii
Summary of Argument and Statement of the Case	1
Facts	2
POINTS:	
The basis for reversal on the issue of damages	3
The basis for reversal on the issue of fraud	5
The basis for reversal on the issue of the validity of the release	7
The basis for the Court's reversal of the judgment for $30,282.33 for goods had and received	8
The decisions do not support plaintiff's claim that the Second Circuit employs an improper standard in reviewing the lack of evidence to support a verdict	9
The petition should be denied	9

TABLE OF AUTHORITY.

DiRose v. PK Management Corp. and Frank Ciccarelli, 691 F. 2d 628	1

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Summary of Argument and Statement of the Case.[1]

The Court of Appeals reversed a judgment entered on a jury verdict for $362,000 compensatory and $500,000 punitive damages for fraud in the inducement against defendants PK Management Corp. ("PK") and Frank Ciccarelli ("Ciccarelli") and for $30,282.33 against defendant PK for goods had and received, and remanded the case for a new trial. The reversal was based upon errors in the trial court's charge, evidence which was improperly admitted and considered by the jury, and the

[1]Page references preceded by a "B" are to the decision of the Court of Appeals set forth in the appendix attached to the petition herein.

absence of any evidence in the record to support the verdict on certain issues. To the extent the order herein was based upon lack of evidence, there is no indication that the Court applied an improper standard in arriving at such determination or that it improperly weighed conflicting evidence or failed to give plaintiff the benefit of any evidence or reasonable inferences which could be drawn therefrom as claimed by plaintiff-petitioner.

The petition likewise does not demonstrate that the Court of Appeals for the Second Circuit habitually applies improper standards in reviewing issues involving the sufficiency of evidence to support verdicts or that its standards in such matters differ from those customarily applied by other circuit courts.

A review by this Court will consequently result at best in an academic discussion of standards to be employed by circuit courts in reviewing evidence unrelated to any problem presented by the record in this case. There is no necessity for such a review.

Facts.

Plaintiff owned and operated 18 pizza stores in Buffalo, New York. In February, 1976, he leased 11 of the 18 to the defendant PK Management Corp. for six months. The leases permitted the defendant PK to cancel the lease with respect to any or all of the stores prior to six months on thirty days' notice and to renew any lease on any store for additional six-month periods. Defendant PK terminated all leases at the end of six months and plaintiff on December 13, 1976, reacquired the 11 stores by purchasing all of the stock of Buffalo George Urban Corporation, a wholly-owned subsidiary which had been operating these

stores, from defendant PK. At the same time plaintiff executed a release dated December 13, 1976, releasing defendants from any and all liability arising out of the lease and the operation of the leased stores (B2-5).

A year and a half after plaintiff resumed ownership and control of the 11 stores, he claimed for the first time when this action was commenced that defendant Ciccarelli, Executive Vice President of PK, had induced him to enter the lease based on an oral fraudulent promise that PK would spend at least $80,000-$100,000 in redecorating each of the 11 restaurants which would revert to plaintiff in the event PK cancelled the lease with respect to any of the restaurants. It was defendants' claim that the stores were rented on a trial basis and that the intention of redecorating any store was expressly conditioned on the store being economically viable (JA 1283-5, 1296-7, 1558, 1698-9). These stores were losing money when leased to PK. Plaintiff admitted in his testimony that the reason there was nothing in the lease obligating PK to redecorate was because defendant Ciccarelli told him PK would probably not accept a lease containing any such obligation (JA 1885-90).

The basis for reversal on the issue of damages.

It is obvious from the Court of Appeals' decision that its reversal was based on errors in the court's charge with respect to the issue of damages (B5-6), fraud (B9-10), and the validity of the release (B11) executed by plaintiff, as well as on the lack of any evidence in connection with certain issues.

In connection with the issue of damages, the Court's reversal was based upon the complete absence of any

evidence bearing on the *proper* measure of damages (B6, 8). It was not based on weighing conflicting evidence or failure to give plaintiff the benefit of any evidence which supported the verdict or reasonable inferences which might be drawn therefrom. Mr. Dopkins, plaintiff's expert, testified that the value of plaintiff's *18 stores* (the entire business) was $362,000 (B6). The jury returned a verdict for compensatory damages in the exact amount (B6). As the Court pointed out, there was no testimony concerning the value of the *11 stores which defendant PK leased* (B8). There was no testimony concerning the right to lease and operate the stores for six months which was all plaintiff gave up since he automatically reacquired the stores upon the defendant's failure to renew the lease at the end of six months (B4). There was no testimony as to the *value of what plaintiff received in return* for giving up the right to operate the restaurants for six months (i.e., the assumption of plaintiff's personal obligation to pay $18,000 per month in connection with the operation of the 11 stores and PK's agreement to employ plaintiff at the rate of $25,000 per year) (B4, 6). There was no testimony concerning the value of the 11 restaurants when plaintiff reacquired them on December 13, 1976, which, although an improper date to use in order to measure damages (B6), was the date according to plaintiff which should be used in determining the existence and amount thereof.[2]

Furthermore, the Court of Appeals threw out Dopkins' testimony on the ground that he had used an improper and inadequate method in appraising the value of plaintiff's business and had failed to properly explain the factors on

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[2]The issue of damages claimed by plaintiff in connection with defendant PK's alleged negligent operation of the leased stores was dismissed by the trial court on the ground that it belonged to Buffalo George Urban Corporation which was not a party to the action (JA 1257).

which he based his judgment. In other words, the Court held that consideration of his testimony was not permissible on the issue of damages and should have been excluded (B5-8). This exclusion leaves the record with no evidence of damages on which the verdict can be based.

The basis for reversal on the issue of fraud.

With respect to the issue of fraud, the Court's reversal could have been based on the absence of any evidence, but the Court chose to base it on the trial court's improper charge that if Ciccarelli made the representations concerning PK's alleged intention to redecorate recklessly, without knowledge of whether they were true, the jury's finding would be that there was an intent to deceive (B9). The Court held that, "in the setting of this case," the charge was improper (B9). Ciccarelli testified only that PK might redecorate if the restaurants proved viable, not that it would in any event (JA 1283-5; 1296-7; 1558; 1698-9). The fact that the leases were only for six months (JA 2227) and could be cancelled on thirty days' notice was supportive of this testimony (JA 1287-8, 2227, 2230-1). Furthermore, plaintiff was well aware of PK's position *that it might, not that it would,* redecorate as a result of a conversation which occurred in connection with the drafting of the lease. When asked to explain why the agreement contained no obligation on PK's part to redecorate, plaintiff testified that Ciccarelli told him it would be difficult for him to get PK to agree to redecorate and that PK would probably not accept any agreement containing such an obligation. Plaintiff admitted that that was the reason there was no clause in the lease concerning redecoration—that such a clause was purposely omitted because of

fear that PK would not accept a contract containing such a clause (JA 1885-1890).[3]

Plaintiff consequently knew that PK was not making any promise to redecorate and consequently he could not as a matter of law have been fraudulently induced into signing the lease based upon a belief that PK would redecorate if the stores were leased for six months. He knew he was taking a risk that PK would not redecorate. In spite of the fact that such evidence would have warranted granting defendant's judgment n.o.v., the Court's reversal was not based upon the absence of evidence or fraud, but upon an improper charge that the jury might find fraud if Ciccarelli made reckless representations concerning redecoration (B9). There was a complete absence of any evidence justifying any such charge.

The Court's reversal was also based upon the finding that the trial court should have charged that the defendant's mere failure to redecorate was insufficient to sustain plaintiff's burden of proof that the defendant PK never intended to do so (B10). There was no evidence in the record that defendant never intended to redecorate except for the fact that they had not done so (B9). The trial court charged that events occurring after the alleged promise to redecorate might provide evidence to the jury of the intent with which the promise was made (JA 2070), but failed to

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[3]The trial court in denying defendants' motion for judgment n.o.v. speculated that the jury "could reasonably have concluded" that Ciccarelli told plaintiff that a written agreement was not necessary and that PK would redecorate the restaurants even though it would not formally commit itself in writing (see petition, A-3). There is no testimony in the record to justify the speculation. In addition, the lease provided it contained the entire agreement and could only be amended in writing signed by the party to be charged (JA 2257).

charge that the mere failure to perform was not sufficient to sustain plaintiff's burden that defendants falsely stated their intentions. The Court held this was error (B10). While the Court could have reversed on the absence of any evidence bearing on intent, it did not do so.

The basis for reversal on the issue of the validity of the release.

The same observation may be made with respect to the Court's reversal in connection with the validity of plaintiff's release, namely: that while the Court could have based its reversal with respect to the complete absence of any proof that plaintiff was coerced when he released the defendants on December 13, 1976, the reversal was actually based upon errors in the charge or failures to charge (B10-12).

Plaintiff's attorneys claimed plaintiff was coerced into signing the release because of his fear that if he did not, he would lose his $25,000 a year job with Buffalo George, PK's wholly-owned subsidiary. They offered no proof, however, in support thereof. Plaintiff never testified he signed because of fear of losing his job (JA 172-198). Plaintiff knew, however, that neither PK nor its subsidiary was going to continue his employment even if he did sign the release. He was going to lose it regardless. He was not consequently enticed into signing the release by any hope that it would result in his continued employment by the defendants or by any fear that if he did not sign, he would lose his job. The loss of his job had no connection with whether he signed the release.

The petition fails to come up with any evidence to support the attorneys' claim of coercion. The most the petition contends is that "plaintiff felt he was coerced" (see

petition, p. 20). While it claims that plaintiff might have been *fraudulently* induced into signing the release (petition, p. 20), plaintiff made no such claim in his testimony, the court made no reference to any such claim in its charge (JA 2058-62), and the petition sets forth no evidence in support of it. The trial court dismissed plaintiff's cause of action that he had been fraudulently induced into buying the stock of Buffalo George from PK which plaintiff purchased on the same date he signed the release, December 13, 1976 (JA 1257). Plaintiff took no appeal from such order of dismissal. When plaintiff reacquired the stores on that December 13th through the purchase of Buffalo George stock, he knew they had not been redecorated. Yet he signed the release without even a peep in protest. Petitioner's claim that he was fraudulently induced to sign the release has no evidentiary support. The only issue presented to the jury was whether plaintiff had been coerced into signing it—not fraudulently induced.

While the Court consequently could have reversed based upon the complete lack of any evidence of coercion, it chose to do so on the ground that the trial court failed to charge the jury with respect to PK's right to terminate plaintiff's employment in accordance with the law of New York State and failed to charge that a threat to do what a legal person has a right to do does not constitute duress (B10-11). The Court also felt that the plaintiff had waived his rights to claim duress as a matter of law by reason of his failure to explain his lengthy delay in repudiating the release (B12).

The basis for the Court's reversal of the judgment for $30,282.33 for goods had and received.

The Court based its reversal of that part of the judgment for $30,282.33 against defendant PK alone for goods

had and received on the ground that there was a total absence of proof as to the value the inventory returned to plaintiff when he reacquired the stores through his purchase of Buffalo George Urban Corporation's stock on December 13, 1976 (B13), and consequently no proof of damages. Apparently plaintiff-petitioner does not dispute the Court's reversal of this part of the total judgment of $392,282.33 since no mention whatsoever is made about it in his brief.

The decisions do not support plaintiff's claim that the Second Circuit employs an improper standard in reviewing the lack of evidence to support a verdict.

A review of the decisions cited by plaintiff-petitioner in his brief fails to support petitioner's contention that the Second Circuit is applying an improper standard generally. With the exception of the *Inwood* case, the Second Circuit cases cited clearly demonstrate that they were reversed based upon a complete lack of evidence of any probative value with respect to the issue under consideration and did not result from the Court's weighing conflicting evidence; or substituting its evidentiary finding for that of the lower court; or failure to give plaintiff the benefit of evidence in his favor or reasonable inferences to be drawn therefrom. To the extent that this happened in the *Inwood* case, the error was properly corrected by this Court's decision on appeal, thus obviating the necessity of further review of the standards employed by the Second Circuit in such matters.

The petition should be denied.

The petition herein sets forth nothing but the unsupported charges of the plaintiff's attorneys that the Court,

to the extent its reversal was based on a lack of evidence, employed improper standards in evaluating the evidence in this case. The petition also claims the prior decisions of the Court demonstrate that it customarily employs an improper standard in determining whether there is evidence to support a verdict. Neither the evidence in this case nor the decisions cited by the petition support the charges. If plaintiff's claim is true that other circuit courts apply improper standards, it is a matter which is of no concern to the parties in this action and does not warrant certiorari in this case.

The petition should be denied.

Dated: March 31, 1983

Respectfully submitted,

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